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STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellant,

vs.

DANIEL RAY BEAN,

Defendant-Appellee.

SC No.

COA No. 342953

Lower Court File No. 17-000174-FC
Muskegon County Circuit Court

_____/

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_____/

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF DECISION APPEALED FROM AND RELIEF SOUGHT

The People seek leave to appeal from the unpublished decision of the Court of Appeals in *People v Bean*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2019 (Docket Nos. 342953 and 343008) (Appendix F).

Defendant sexually assaulted his 15-year-old step-niece while she was in his care by touching both her breasts and vagina underneath her clothes (under her bra and underwear), and placing his hand on her bare skin and inserting his fingers inside the lips of her vagina. (PE Vol I Tr, pp 14-16, 37, 39-40, 65.) This sexual assault supports the element of "serious mental harm" as defined in MCL 750.136b(1)(g) for second-degree child abuse under MCL 750.136b(3)(b), and, therefore, the prosecutor charged Defendant with first-degree criminal sexual conduct (first-degree CSC) under MCL 750.520c(1)(c)—that involves the elements of (1) sexual penetration (2) that "occurs under circumstances involving the commission of *any other felony*" (emphasis supplied).

Defendant moved to dismiss, arguing that the phrase "any other felony" in MCL 750.520b(1)(c), "must be interpreted to mean some other felony, separate and distinct from the sexual penetration comprising first degree criminal sexual conduct itself." His factual argument and his focus on the *act* of sexual penetration is flawed because Defendant's *act* was a sexual assault—not simply penetration—on his 15-year-old step-niece. Again, he did this by touching both her breasts and vagina underneath her clothes (under her bra and underwear), and placing his hand on her bare skin and inserting his fingers inside the lips of her vagina. (PE Vol I Tr, pp 14-16, 37, 39-40, 65.) Accordingly, Defendant's sexual assault of his step-niece was not limited to sexual penetration, although, frankly, even if sexual penetration were the sole conduct at issue Defendant's position is still without merit. In any event, the limited scope of Defendant's

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argument—focusing solely on the "sexual penetration" part of his sexual assault of his step-niece—fails to recognize that there is much more to the victimization of his step-niece that supports that he "knowingly or intentionally commit[ted] an act likely to cause serious … mental harm to a child regardless of whether harm results." MCL 750.136b(3)(b).

Remarkably, the Court of Appeals accepted Defendant's argument and, therefore, clearly erred in interpreting MCL 750.520c(1)(c) as excluding second-degree child abuse under MCL 750.136b(3)(b) as "any other felony" where, *factually*, the *act* of sexual penetration—which is an element for first-degree CSC—was included within the sexual assault committed by Defendant on his step-niece. Specifically, the Court of Appeals stated:

> the sexual penetration underlying the second-degree child abuse is not "distinct" or "different" from the sexual penetration, but rather is the exact same conduct.[1] As such, under the facts of this case, the second-degree child abuse cannot constitute the "other felony" in MCL 750.520b(1)(c), and the trial court abused its discretion in denying defendant's motion to quash on this ground.
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> [1] The prosecution's interpretation of the statutory language would automatically elevate every CSC-III charge to CSC-I. This cannot be the intent of the legislature. [Appendix F, p 3.]

The Court of Appeals should be reversed.

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STATEMENT OF THE QUESTION PRESENTED

DOES THE AUTHORIZATION UNDER MCL 750.520b(1)(c) FOR A CONVICTION OF FIRST-DEGREE CRIMINAL SEXUAL CONDUCT WHEN A PERSON ENGAGES IN SEXUAL PENETRATION WITH ANOTHER UNDER CIRCUMSTANCES INVOLVING THE COMMISSION OF "*ANY OTHER FELONY*" INCLUDE THE FELONY OF SECOND-DEGREE CHILD ABUSE, MCL 750.136b(3)(b), WHERE THE ACT OF SEXUAL ASSAULT (WHICH INCLUDES, *INTER ALIA*, SEXUAL PENETRATION) WAS LIKELY TO CAUSE "SERIOUS MENTAL HARM" AS THAT TERM IS DEFINED IN MCL 750.136b(1)(g)?

Plaintiff-Appellant says, "Yes."
Defendant-Appellee says, "No."
The trial court says, "Yes."
The Court of Appeals says, "No."

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STATEMENT OF JURISDICTION

The Supreme Court may review by appeal a case after decision by the Court of Appeals. MCR 7.301(A)(2). The procedures for such appeal are outlined in MCR 7.305. The Court of Appeals decision reversing the trial court's denial of Defendant's motion to dismiss was entered on February 14, 2019. (Appendix F.) An application for leave in a criminal case must be filed within 56 days of a decision of the Court of Appeals resolving an appeal. MCR 7.305(C)(2)(a). Plaintiff's application is being filed within 56 days of the Court of Appeals February 14, 2019, decision. Accordingly, this application for leave to appeal is timely.

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STATEMENT OF THE FACTS

The People apply for leave to appeal from the February 14, 2019, decision of the Court of Appeals (Appendix F) that reversed the February 27, 2018, opinion and order regarding February 20 Motions (Appendix A) entered by the 14th Judicial Circuit Court for the County of Muskegon, the Honorable TIMOTHY G. HICKS, presiding.

Defendant is charged with first-degree criminal sexual conduct (first-degree CSC) under a theory that sexual penetration occurred under circumstances involving the commission of any other felony—to wit: second-degree child abuse under MCL 750.136b(3)(b)—MCL 750.520b(1)(c).

On September 4 or 5, 2016, then-15-year-old AK (d/o/b 03/18/2001) was digitally penetrated by Defendant—her step-uncle—at his house at 7319 North Maple Island Road in Holton Township. (07/20/2017 Preliminary Examination Vol I ["PE Vol I"] Tr, pp 8-11, 14-16, 18, 35-37, 39, 42, 44, 65, 69-70 [Appendix B]; 08/31/2017 Preliminary Examination Vol III ["PE Vol III] Tr, p 57 [Appendix D].)[1]

The family dynamics are as follows. AK's mother is Tabatha Wesley who is married to AK's step-dad Joe with whom AK has no blood relationship. (PE Vol I Tr, p 18; PE Vol III Tr, pp 56, 60, 66.) Her step-dad Joe has a sister, Amy, who is married to Defendant. (PE Vol I Tr, p 18.) AK has no blood relationship with either Defendant or his wife Amy. (PE Vol I Tr, p 18; PE Vol III Tr, p 66.) Tabatha and Joe have a son together—Jase—making him AK's half-brother. (PE Vol III Tr, pp 69-70.) Finally, AK's siblings and AK referred to Defendant as "Dan" rather than step-uncle or uncle. (PE Vol I Tr, pp 9, 18; PE Vol III Tr, p 58.)

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[1] The transcript for the August 10, 2017, preliminary examination (Volume II) is found in Appendix C.

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Leading up to the sexual penetration, AK had fallen asleep on a black mini couch with two cushions next to the TV at the step-uncle's house. (PE Vol I Tr, pp 12, 14, 29-31.) She remembered that, before she fell asleep, the three little kids, "Alyssa, Rowan, and [her] little brother Jayse were on the couch right across from me." (PE Vol I Tr, pp 33-34.) The little kids were watching *Little Mermaid* on the TV that was next to the couch AK was lying on. (PE Vol I Tr, p 33.) She could hear her step-cousin Riley and her 15-year-old brother Zane, "either playing hide and go seek or messing around in the other, like, part of the room," but could not see them. (PE Vol I Tr, pp 23, 33, 34.)

AK was wearing shorts and a sweatshirt with a bra and underwear underneath. (PE Vol I Tr, pp 12-13.) She was covered with a blanket. (PE Vol I Tr, p 13.) As she was falling asleep, Defendant sat down at the end of the couch she was lying on and put her legs on top of his lap. (PE Vol I Tr, pp 14, 31-32.) She thinks she was asleep for about 10 minutes when she woke up "[b]ecause I felt someone touching me." (PE Vol I Tr, pp 14, 35.) It was Defendant's hand. (PE Vol I Tr, p 14.) He was touching her legs. (PE Vol I Tr, pp 14, 35-37.) Once she was awake, "[h]e touched my chest area and around my vagina." (PE Vol I Tr, pp 14, 37.) He was touching both her chest and her vagina at the same time underneath her clothes (under her bra and underwear). (PE Vol I Tr, pp 14-15, 37, 39.) His hand was on her bare skin. (PE Vol I Tr, pp 15, 39-40.) His hand or fingers went inside the lips of her vagina. (PE Vol I Tr, pp 15-16, 65.) She did not call out or try to get anyone's attention because she was scared. (PE Vol I Tr, p 16.) He then told the kids that they needed to go to bed so he took her two cousins upstairs to tuck them in. (PE Vol I Tr, pp 16, 40.) She "laid on the couch for like ten, twenty minutes thinking about what to do and then … decided to call [her] mom." (PE Vol I Tr, p 16.) "It was like 1:00 a.m." (PE Vol I Tr, pp 16, 42, 44.) She did not have cellphone service in the house,

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"so I snuck out of the house and … walked down the road a little bit and then … called her." (PE Vol I Tr, pp 16-17, 40, 41-42, 43, 44.) She told her mother that "Dan touched me." (PE Vol I Tr, p 44.) Her mother told her that "She's going to come pick me up." (PE Vol I Tr, p 45.) The police, her mother, and step-dad came out to the house. (PE Vol I Tr, pp 17, 45, 47-49.)

Defendant moved to dismiss, claiming that, although sexual penetration is not an element of second-degree child abuse, the same act or conduct of sexual penetration is an element of the charge of first-degree CSC under MCL 750.520b(1)(c) and is being used to support the theory of second-degree child abuse, MCL 750.136b(3)(b), and, therefore, second-degree child abuse cannot serve as the predicate "other felony" for the charge of first-degree CSC under MCL 750.520b(1)(c). The trial court denied Defendant's motion and the Court of Appeals reversed, holding that

> the sexual penetration underlying the second-degree child abuse is not "distinct" or "different" from the sexual penetration, but rather is the exact same conduct.[1] As such, under the facts of this case, the second-degree child abuse cannot constitute the "other felony" in MCL 750.520b(1)(c), and the trial court abused its discretion in denying defendant's motion to quash on this ground.
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> [1] The prosecution's interpretation of the statutory language would automatically elevate every CSC-III charge to CSC-I. This cannot be the intent of the legislature. [Appendix F, p 3.]
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Additional facts as relevant to the issue will be set forth in the Law and Argument section.

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LAW AND ARGUMENT

THE AUTHORIZATION UNDER MCL 750.520b(1)(c) FOR A CONVICTION OF FIRST-DEGREE CRIMINAL SEXUAL CONDUCT WHEN A PERSON ENGAGES IN SEXUAL PENETRATION WITH ANOTHER UNDER CIRCUMSTANCES INVOLVING THE COMMISSION OF "*ANY OTHER FELONY*" INCLUDES THE FELONY OF SECOND-DEGREE CHILD ABUSE, MCL 750.136b(3)(b), WHERE THE ACT OF SEXUAL ASSAULT (WHICH INCLUDES, *INTER ALIA*, SEXUAL PENETRATION) WAS LIKELY TO CAUSE "SERIOUS MENTAL HARM" AS THAT TERM IS DEFINED IN MCL 750.136b(1)(g).

A. *Standard of review*

"This Court reviews de novo questions of statutory interpretation." *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

B. *Analysis of the issue*

1.

Two crimes are at issue—first-degree CSC under MCL 750.520b(1)(c) *and* second-degree child abuse under MCL 750.136b(3)(b). Defendant is only *charged* with first-degree CSC under MCL 750.520b(1)(c). Although the second offense of second-degree child abuse is not charged, it serves as the "any other felony" element for the first-degree CSC offense that is charged.

MCL 750.520b(1)(c), provides:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists: * * *
>
> * * *
>
> (c) [s]exual penetration occurs under circumstances involving the commission *of any other felony*. [Emphasis supplied.]

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Again, the "any other felony" here is second-degree child abuse, MCL 750.136b(3)(b), which provides in relevant part:

> A person[2] is guilty of child abuse in the second degree if any of the following apply:
>
> * * *
>
> (b) The person knowingly or intentionally commits an act likely to cause serious … mental harm[3] to a child[4] regardless of whether harm results….

Defendant argued that the phrase "any other felony" in MCL 750.520b(1)(c), "must be interpreted to mean some other felony, separate and distinct from the sexual penetration comprising first degree criminal sexual conduct itself." (Defendant's COA application, p 18.) Thus, he asserts that he should only be charged with the 15-year-felony of third-degree criminal sexual conduct under MCL 750.520d(1)(a)[5]—for the sexual penetration of his 15-year-old step-niece—because the Legislature did not intend for him to suffer up to life imprisonment and mandatory lifetime electronic monitoring where the prosecution is able to also prove that he

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[2] The term "'person' means a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person." MCL 750.136b(1)(d).

[3] The phrase "serious mental harm"

> means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. [MCL 750.136b(1)(g).]

[4] The term "'[c]hild' means a person who is less than 18 years of age and is not emancipated by operation of law as provided in section 4 of 1968 PA 293, MCL 722.4." MCL 750.136b(1)(a).

[5] MCL 750.520d(1)(a) provides: "A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: (a) [t]hat other person is at least 13 years of age and under 16 years of age."

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committed second-degree child abuse based on the same *fact* that he sexually penetrated his 15-year-old step-niece that would satisfy the "sexual penetration" element of first-degree CSC.[6]

Under any analysis, it should be apparent that the theory of first-degree CSC charged and second-degree child abuse are not the "same" offense. They clearly do not share any statutory elements much less the same statutory elements. However, Defendant's theory is that they are the "*same* felony" and, therefore, he cannot be charged under the theory of "any *other* felony". To get to this precipice, he focuses on the term "sexual penetration" and argues that, since both offenses require a *factual* showing of "sexual penetration", they are the "*same* felony" and, thus, second-degree child abuse cannot satisfy the "any *other* felony" element of first-degree CSC. Said another way, Defendant contends that the "same conduct" of sexual penetration during the same transaction makes the two felonies the "same".[7] In short, he views first-degree CSC and second-degree child abuse as the "same felony" because Defendant's *act* of "sexual penetration" supports guilt for each offense. (Defendant's COA application, p 10.) Thus, to Defendant, if any *fact* is used to prove both first-degree CSC *and* the "other felony", the "other felony" is actually the "same felony" and, therefore, the first-degree CSC charge must be dismissed.

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[6] Defendant does not claim that, as a matter of law, he cannot be convicted of second-degree child abuse if a jury finds that he sexually penetrated his 15-year-old step-niece and this "act [was] likely to cause serious … mental harm to" her.

[7] It is noted that Defendant's act was a sexual assault on his 15-year-old step-niece. He did this by touching both her breasts and vagina underneath her clothes (under her bra and underwear), and placing his hand on her bare skin and inserting his fingers inside the lips of her vagina. (PE Vol I Tr, pp 14-16, 37, 39-40, 65.) While sexually assaulting his step-niece, Defendant had her feet on his lap. Accordingly, Defendant's sexual assault of his step-niece was not limited to sexual penetration. Hence, the limited scope of Defendant's argument—focusing solely on the "sexual penetration" part of his sexual assault of his step-niece—fails to recognize that there is much more to the victimization of his step-niece that supports that he "knowingly or intentionally commit[ted] an act likely to cause serious … mental harm to a child regardless of whether harm results." MCL 750.136b(3)(b).

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To begin, Defendant's factual argument and his focus on the *act* of sexual penetration is flawed because Defendant's *act* was a sexual assault—not simply penetration—on his 15-year-old step-niece. He did this by touching both her breasts and vagina underneath her clothes (under her bra and underwear), and placing his hand on her bare skin and inserting his fingers inside the lips of her vagina. (PE Vol I Tr, pp 14-16, 37, 39-40, 65.) While sexually assaulting his step-niece, Defendant had her feet on his lap. Accordingly, Defendant's sexual assault of his step-niece was not limited to sexual penetration. Hence, the limited scope of Defendant's argument—focusing solely on the "sexual penetration" part of his sexual assault of his step-niece—fails to recognize that there is much more to the victimization of his step-niece that supports that he "knowingly or intentionally commit[ted] an act likely to cause serious … mental harm to a child regardless of whether harm results." MCL 750.136b(3)(b).

According to the plain language of MCL 750.520b(1)(c), the prosecution must prove two elements: (1) sexual penetration (2) that "occurs under circumstances involving the commission of *any other felony*." (Emphasis supplied.) See *People v Wilkens*, 267 Mich App 728, 737; 705 NW2d 728 (2005), lv denied 474 Mich 1099; 711 NW2d 73, reconsideration denied 475 Mich 899; 716 NW2d 268 (2006). The word "any" means "every". *In re Forfeiture of $5,264*, 432 Mich 242, 249-250; 439 NW2d 246 (1989). Thus, by using the phrase "any other felony", the Legislature means "every other felony". Hence, any felony other than first-degree criminal sexual conduct is within the scope of MCL 750.520b(1)(c).

On the other hand, to establish second-degree child abuse under MCL 750.136b(3)(b), the prosecution must prove that Defendant (1) had care or authority over the child; (2) that he knowingly or intentionally did an act, and (3) that this act was likely to cause serious mental

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harm to the child regardless of whether such harm resulted. M Crim JI 17.20a Child Abuse, Second Degree (Act Likely to Cause Serious Harm).

"Sexual penetration" is *not* a statutory element of second-degree child abuse and second-degree child abuse cannot be proven by merely showing that Defendant sexually penetrated his 15-year-old step-niece. Instead, second-degree child abuse can only be proven if the prosecution can show that Defendant "knowingly or intentionally commit[ed] an act likely to cause serious … mental harm to a child regardless of whether harm results." MCL 750.136b(3)(b).

The "act" at issue—that was "likely to cause serious … mental harm to" Defendant's 15-year-old step-niece who is a "child" as defined in MCL 750.136b(1)(a)[8]—was Defendant's sexually assaulting her by touching her breasts and vagina underneath her clothes (under her bra and underwear), and placing his hand on her bare skin and inserting his fingers inside the lips of her vagina. (PE Vol I Tr, pp 14-16, 37, 39-40, 65.) As testified to by Emily Frieberg, an expert in in the area of child sexual abuse and trauma,[9] this act was likely to cause serious mental harm to the victim. (PE Vol III Tr, pp 27, 30-31.) Indeed, for several months leading up to the August 31, 2017, preliminary examination hearing, Defendant's step-niece has been in a counseling relationship with Ms. Frieberg of the Child Abuse Council as a result of the trauma caused by this sexual assault. (PE Vol III Tr, pp 8, 36, 39.)

2.

The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The objective is to

[8] "'Child' means a person who is less than 18 years of age and is not emancipated by operation of law as provided in section 4 of 1968 PA 293, MCL 722.4." MCL 750.136b(1)(a).

[9] Among other things, Emily Frieberg has a bachelor's and master's degree in social work, is certified in trauma focused cognitive behavioral therapy, works at the Child Abuse Council as a forensic interviewer and child therapist, and has substantial experience in counseling children. (PE Vol III Tr, pp 8-10, 27.)

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discern the intent of the Legislature from the plain language of the statute. *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001). A Court "begin[s] by examining the plain language of the statute; where that language is unambiguous, [it] presume[s] that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). In doing so, a court must be mindful that "[i]t is the role of the judiciary to interpret, not write, the law." *People v Schaefer*, 473 Mich 418, 430-431; 703 NW2d 774 (2005), clarified in part on other grounds *People v Derror*, 475 Mich 316, 320; 715 NW2d 822 (2006).

3.

The plain language of MCL 750.520b(1)(c), merely requires that "[s]exual penetration occur[] under circumstances involving the commission of *any other felony*." (Emphasis supplied.) As explained by the Court in *People v Jones*, 144 Mich App 1, 4; 373 NW2d 226 (1985), "[t]he Legislature … did not attempt to narrowly define the coincidence or sequence of the sexual act and the other felony; rather it chose to address the increased risks to, and the debasing indignities inflicted upon, victims by the combination of sexual offenses and other felonies by treating the sexual acts as major offenses when they occur 'under circumstances involving the commission of any other felony.'"

The Court in *People v Waltonen*, 272 Mich App 678, 692; 728 NW2d 881 (2006), noted that "[t]he key language of the statute is 'occurs under circumstances involving,' which does not necessarily demand that the sex act occur during the commission of the felony, *although this generally will be the case*." (Emphasis supplied.) Where there is "a direct interrelationship between the felony and the sexual penetration[,]" *id.*, 693, this statutory language is satisfied.

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Defendant thinks that such reading "completely ignores the clear intent of the word '*other*' in 'other felony[.]'" (Defendant's COA application, p 14.) However, the term "other" merely means "different or distinct from the one or ones mentioned or implied" or "different in nature or kind". *The Random House College Dictionary* (rev'd ed, 1084), p 941. This, of course, would mean in the context of a criminal offense that different elements exist for each offense. In other words, "first-degree criminal sexual conduct" is certainly different or distinct from second-degree child abuse.

In the lower court, Defendant argued that "the body of case law dealing with the 'other felony' variable in the CSC 1 statute under MCL 750.520b(l)(c) derives from cases where the alleged 'other felony' is separate and distinct from the alleged sexual penetration (i.e. sexual penetration in the context of a drug transaction, *a home invasion*, etc.)." (Defendant's circuit court motion brief, p 7. Emphasis supplied.) By his own argument he loses. A "home invasion" is a continuing offense. See, e.g., *People v Shipley*, 256 Mich App 367, 377; 662 NW2d 856 (2003). The offense occurs under alternative theories, including where an assault occurs while the perpetrator is entering, present in, or exiting the dwelling. MCL 750.110a(2)(b). An "assault" may include a sexual assault. See and compare *People v Musser*, 259 Mich App 215, 224; 673 NW2d 800 (2003) ("the fact that the penalty and constituent elements of CSC crimes are codified in a different section than the 'general assault' crimes does not mean that CSC crimes do not constitute a specific type of assault"; thus the Court held "that fourth-degree CSC constitutes an assault for the purposes of the home invasion statute"); see also *People v Pettway*, 94 Mich App 812, 817; 290 NW2d 77 (1980) ("[a]s the prosecution correctly argues, felony, as construed in the phrase 'any other felony,' refers to any felony *other* than criminal sexual conduct" (emphasis in original].) And, a victim assaulted by sexual penetration inside the home

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may jointly serve as an element to the home invasion and to the first-degree criminal sexual conduct under MCL 750.520b(1)(c) where the "other felony" is the home invasion. See, e.g., *People v Sillivan*, unpublished opinion per curiam of the Court of Appeals, issued August 16, 2007 (Docket No. 269501); 2007 WL 2331866 (Appendix E), lv denied 480 Mich 1009; 743 NW2d 17 (2008).[10]

4.

Second-degree child abuse is a general intent crime. *People v Maynor*, 256 Mich App 238, 242; 662 NW2d 468 (2003), aff'd on other grounds 470 Mich 289; 683 NW2d 565 (2004). In other words, "our Legislature contemplated the situation where a person intended an act, but perhaps not the consequences of the act." *Id*. "[T]he words 'knowingly' and 'intentionally' modify the phrase commits an act.'" *Maynor,* 470 Mich at 300 (WEAVER, J., concurring). Thus, in order to establish second-degree child abuse, the prosecution must prove only that a defendant intended to commit an act likely to cause harm, not that a defendant actually intended serious physical or mental harm. *Id.* at 300-301 (WEAVER, J., concurring).

Here, the victim was a "child" at the time of the sexual assault. The "act" in question is Defendant's sexual assault of the victim, which included touching both her breasts and vagina underneath her clothes (under her bra and underwear), and placing his hand on her bare skin, and inserting his fingers inside the lips of her vagina. (PE Vol I Tr, pp 14-16, 37, 39-40, 65.) At the time Defendant did this, he was a person who cared for, had custody of, or had authority over the victim. (PE Vol III Tr, pp 56-57.) And, this act was likely to cause serious mental harm to the victim as that term is defined in MCL 750.136b(1)(g). (PE Vol III Tr, pp 30-31.)

[10] This unpublished case is used because it is on point. A court is entitled to conclude that the reasoning of an unpublished decision is persuasive. *Steele v Dep't of Corrections*, 215 Mich App 710, 714 n 2; 546 NW2d 725 (1996).

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The Legislature's use of the phrase "any other felony" means any felony other than first-degree criminal sexual conduct. *Pettway*, 94 Mich App at 817 ("[a]s the prosecution correctly argues, felony, as construed in the phrase 'any other felony,' refers to any felony *other* than criminal sexual conduct" (emphasis in original]); see also *People v White*, 168 Mich App 596, 604; 425 NW2d 193 (1988) ("[w]e read 'any other felony' as meaning a felony other than the one committed"; thus, the "use of evidence of criminal sexual conduct upon another victim as the 'other felony' which elevates the criminal sexual conduct committed upon the first person to first degree" is not barred).

In *Wilkens*, the "defendant was convicted of[, *inter alia*,] two counts of first-degree criminal sexual conduct (CSC–I), MCL 750.520b(1)(c) (sexual penetration during the commission of another felony)[, and] one count of producing child sexually abusive material, MCL 750.145c(2)." *Wilkens*, 267 Mich App at 730. "On one tape [seized from the defendant's house, which was] entitled "Mixed Signals," [the] defendant had recorded himself, a 14-year-old male, and a 16-year-old female engaging in sexual acts." *Id*., 732. The conviction of producing child sexually abusive material was based on this video as was the conviction of first-degree criminal sexual conduct. "In the 'Mixed Signals' videotape, [the] defendant appears to place his mouth between the female victim's legs on at least one occasion." *Id*., 738-739. "[T]here was sufficient evidence to permit a rational trier of fact to find that defendant made an intrusion, however slight, with a body part or object into the genital opening of the female victim's body." *Id*., 739. "The videotape evidence was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that defendant aided or abetted the male victim's penetration of the female victim, which occurred during the commission of another felony." *Id*., 740. Thus, the acts of sexual penetration depicted in the defendant's video were used to convict him of two counts of

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CSC and of producing child sexually abusive material. These convictions were supported by a plain reading of the CSC statute.

Accordingly, MCL 750.520b(1)(c) authorizes a conviction of first-degree criminal sexual conduct when a person engages in sexual penetration with another under circumstances involving the commission of "*any other felony*"—which would include the felony of second-degree child abuse, MCL 750.136b(3)(b)—where the act of sexual penetration was likely to cause "serious mental harm" as that term is defined in MCL 750.136b(1)(g).

RELIEF REQUESTED

For the foregoing reasons, this Court should either summarily reverse the Court of Appeals or grant this application for leave.

Respectfully submitted,
MUSKEGON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant

/s/ Charles F. Justian

Dated: April 4, 2019

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